81-2190

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EMORY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(No. 80-3497)

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QUESTIONS PRESENTED FOR REVIEW

The District Court entered a Summary Judgment in favor of the United States and against Petitioner, individually, under 26 USC §6672 as a responsible officer for failure to pay over taxes withheld from employees of James Emory Hall Contractors, Inc., a corporation. The Court failed to allow Petitioner to assert (in a counter affidavit to the government's Motion for Summary Judgment) a defense that the government itself failed by its misrepresentation, breach of contract, and negligence to collect these taxes from corporate assets. The Ninth Circuit Court of Appeals affirmed this decision.

The questions thereby arising are:

1. Petitioner was unable to appear personally at the Corporation's bankruptcy to establish a priority and is also precluded from raising a misrepresentation, negligence, estoppel or breach of contract issue on the 6672 proceedings against him personally. Thus, he has no forum to present the issues and thereby is deprived of Due Process of Law under Article V of the constitution.

2. The decision of the Ninth Circuit is in direct conflict with the Seventh Circuit case of *Holcomb v. United States*, 543 F.2d 1185 (7th Cir. 1976).

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In the Supreme Court of the United States

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(No. 80-3497)
(DC No. CV 78-2012 U.S. District Court Idaho)

JAMES EMORY HALL, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The Judgment on the case is dated and was filed February 24, 1982. A Petition for Rehearing was filed March 4, 1982 and was denied March 22, 1982.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was noted as not for publication. It is reproduced as Appendix A, infra p. A-1. The Court affirmed a Summary Judgment in favor of the United States. The case was consolidated with another case (Chatel) for purposes of the opinion.[1]

[1]The two original Defendants in the case were James Emory Hall Contractors, Inc. and James Emory Hall. Only James Emory Hall (personally) filed an appeal and requests review on Certiorari. The consolidated case is *Louis E. Chatel v. U.S.*, No. 80-3460 (Western District of Washington.)

JURISDICTION

The Jurisdiction of the Court is invoked under Supreme Court Rule 17, 28 USC §1651. This Petition for Certiorari is filed within the time allowed.

QUESTIONS PRESENTED

The District Court entered a Summary Judgment in favor of the United States and against Petitioner, individually, under 26 USC §6672 as a responsible officer for failure to pay over taxes withheld from employees of James Emory Hall Contractors, Inc., a corporation. The Court failed to allow Petitioner to assert (in a counter affidavit to the government's Motion for Summary Judgment) a defense that the government itself failed by its misrepresentation, breach of contract, and negligence to collect these taxes from corporate assets. The Ninth Circuit Court of Appeals affirmed this decision.

The questions thereby arising are:

1. Petitioner was unable to appear personally at the Corporation's bankruptcy to establish a priority and is also precluded from raising a misrepresentation, negligence, estoppel or breach of contract issue on the 6672 proceedings against him personally. Thus, he has no forum to present the issues and thereby is deprived of Due Process of Law under Article V of the constitution.

2. The decision of the Ninth Circuit is in direct conflict with the Seventh Circuit case of *Holcomb v. United States,* 543 F.2d 1185 (7th Cir. 1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment Five.

"No person shall . . . be deprived of life, liberty or property, without due process of law."

26 USC 6672; 26 USC 7323(f)

STATEMENT OF FACTS

Petitioner was the President and shareholder of James Emory Hall Contractors, Inc., a corporation engaged in logging primarily in Idaho. The Corporation accumulated large delinquent Federal Withholding taxes. It had assets to pay the delinquent taxes and was allowed to continue to operate by the Internal Revenue Service. Liens were filed by the Internal Revenue Service, but in the wrong state.

In addition, and pursuant to a written Agreement with the District Director of Idaho, Petitioner was to cause the Corporation to pay $2.00 per thousand to the Internal Revenue Service based on board feet of logs removed from the forest and delivered to the purchaser. This sum was to retire the delinquent withheld taxes.

After the written agreement was executed by the Idaho District Director and the Corporation, the Corporation went into bankruptcy proceedings in 1971. The Bankruptcy Judge held that the Internal Revenue Service liens were supposed to be filed in Washington State, not Idaho, pursuant to 26 USC 6323(f), thus giving priority to other secured creditors.

As a result, other creditors got the proceeds from the Corporation assets, not the Internal Revenue Service, and Petitioner's personal 6672 liability to the Internal Revenue Service was not paid by the Corporation's assets.

Next, the Bankruptcy Trustee and the Internal Revenue Service, voluntarily and without consideration, abandoned the $2.00 per thousand payment agreement in the operation of the company under Bankruptcy Chapter 11. Petitioner personally was again powerless to cause this money to be applied to a corporate debt to eliminate his potential personal liability under 26 USC 6672.

REASONS FOR GRANTING THE WRIT

1. The Petitioner personally had no forum to appear and argue his defenses to the 6672 liability as the Ninth Circuit Case of *Securities and Exchange Commission v. Securities Northwest, Inc.*, 573 F.2d 622 (9th Cir. 1978) holds unequivocally that a shareholder-officer cannot appear in a corporate bankruptcy proceeding to question priorities that would affect his 26 USC §6672 liability. The Ninth Circuit in the instant proceeding holds that failure to honor a written contract and government negligence by filing liens in the wrong state by the Internal Revenue Service cannot be raised by a shareholder-officer to defeat a Summary Judgment Motion in a proceeding pursuant to 6672.

Therefore, it is an inescapable conclusion that the Internal Revenue Service activities causing a dissipation of corporate assets available to pay withheld taxes can never be questioned by a responsive officer where a corporate bankruptcy occurs. This is a deprivation of due process.

2. Conflict of Circuits.

The Ninth Circuit in this decision (Appendix I) and *Teel v. U.S.*, 529 F.2d 903 on 906 (9th Cir. 1976) states clearly "A proceeding under 6672 deals with a totally independent liability from that of a corporation" and this cannot be a factual question presented in a proceeding against the responsible officer under 6672.

In *Holcomb vs. U.S.*, 543 F.2d §1185 (7th Cir. 1976), the Seventh Circuit in a 6672 case held that a counterclaim based on misrepresentation and estoppel required reversal of the Summary Judgment. The Court stated on 1188-9 "... Whether this is either true or sufficient grounds for estopping the government we cannot say. The meager facts before us indicate that the matter may well turn out to be an estoppel.... In light of these considerations we do not believe that Summary Judgment was appropriate in this case. As the Supreme Court held in *Poller v. Columbia Broadcasting Company*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), the Summary Judgment "rule authorized Summary Judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is (and where) no genuine issue remains for trial ... (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' "

There is a conflict among the Circuits as to whether defenses of misrepresentation, breach of contract or other defenses may be raised in a 6672 proceeding, and thus preclude Summary Judgment if genuine issues of fact exist.

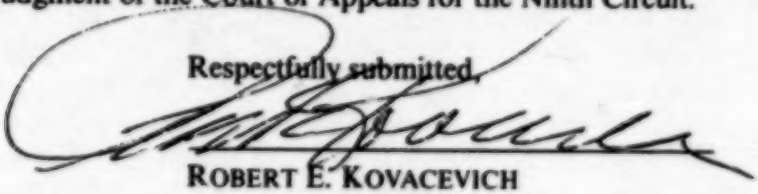
A person who can be assessed by the Internal Revenue Service under 6672 in a summary ex parte proceeding and wiped out of all his net worth, on forced non-judicial sale should at least be able to argue a defense of misrepresentation, breach of contract, or estoppel by the government to preclude a Summary Judgment, especially since this court has held that such a debt is not dischargeable in a personal bankruptcy. *U.S. v. Sotelo*, 436 U.S. 268, (1978).

Petitioner does not here request a decision in his favor as to the issues, only a right to be heard as to these issues. To date, he has been given no forum to raise the issues.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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Dated: May 17, 1982